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March 31, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas, Esq., Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **CC Docket No. 00-45:** In re MCI WorldCom, Inc. Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules

Dear Secretary Salas:

Connect Communications Corporation, PacWest Telecomm, Inc., Globalcom, Inc. and RCN Corporation, by their undersigned counsel, respectfully submit an original and seven (7) copies of their Joint Comments in the above-referenced proceeding. Copies of these comments have been served on the parties on the attached service list.

Please date-stamp and return the enclosed extra copy of this filing.

Respectfully yours,

Richard M. Rindler

cc: Service List

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
MCI WORLDCOM, INC.)
)
Petition for Expedited Declaratory Ruling) CC Docket No. 00-45
Regarding the Process for Adoption of)
Agreements Pursuant to Section 252(i))
of the Communications Act and Section)
51.809 of the Commission's Rules)

JOINT COMMENTS OF CONNECT COMMUNICATIONS CORPORATION PACWEST TELECOMM, INC., GLOBALCOM, INC. AND RCN CORPORATION

Connect Communications Corporation, PacWest Telecomm, Inc., Globalcom, Inc. and RCN Corporation ("Joint Commenters"), provide, or intend to provide, directly or indirectly, competitive local telecommunications service in many states throughout the United States. Joint Commenters can readily attest to the concerns raised by MCI WorldCom, Inc. ("MCIW") in its Revised Petition to the Commission seeking a declaratory ruling relating to the proper implementation of Section 252(i) of the Communications Act of 1934, as amended ("the Act").[1] Section 252 (i) permits CLECs the option of adopting in whole, or in part, interconnection agreements entered into between ILECs and other CLECs. The importance of this option is

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1 *Revised Petition of MCI WorldCom, Inc.*, CC Docket No. 00-45 (dated March 7, 2000) ("*MCIW Petition*").

highly significant. As CLECs initially seek to begin operations and then to expand beyond their initial geographic areas, the "opt-in" opportunity is critical in terms of both time to market and cost and expense.

As the FCC is well aware, interconnection agreements, which seek to detail all aspects of the complex relationship between CLECs and ILECs and are essential to the CLECs' entry into the local market, can run into the hundreds of pages. If every new entrant to the industry or into particular markets was faced with the cost of negotiating such agreements from scratch, this process alone would present a significant barrier to competitive entry. Recognizing this, Congress provided the Section 252(i) procedure whereby CLECs would have the option of adopting in whole, or in part, interconnection agreements previously reviewed and approved by the relevant state public utility commission.

I. <u>The Purpose of Section 252(i) Has Been Undermined by State Requirements</u>

Section 252(i) in essence was designed to remove an entry barrier by allowing automatic availability of interconnection agreements previously approved by a state commission. In its purest form a CLEC would adopt an entire agreement subjecting itself to the terms previously negotiated by the original parties. In many cases, these terms might not be the ideal terms for the CLEC that decides to opt-in to an agreement, but that is the "price" the CLEC pays in exchange for quick entry into the market.

This at least was the idea behind Section 252(i). Consistent with the overall purposes of the Act, barriers to entry into local markets were to be lessened or eliminated. Section 252(i) is an important element of this approach. As the *MCIW Petition* makes clear, however, this goal has been frustrated by a number of factors.[2] The *MCIW Petition* appropriately details many of the state obstacles to full utilization of the opt-in option to "quick start" competitive entry.[3] In fact, there are even more extreme examples of that phenomenon. Some states have taken the position that a CLEC cannot receive certification until it has an interconnection agreement in place.[4] Some ILECs have in turn taken the position that they will not negotiate an interconnection agreement until a CLEC is certificated. When either the state or the ILEC imposes delay in the opt-in process, this circular phenomenon becomes not only frustrating but a significant delay in market entry.

The validity of MCIW's concerns are also highlighted by the fact that many of the obstacles to the full utilization of the opt-in option were put in place at a time when the only way in which a CLEC could utilize 252(i) was to adopt the entire agreement entered into between the ILEC and the CLEC. This resulted not from FCC action, or state action, but from the decision of the Eighth Circuit vacating in part the FCC's opt-in rules at the urging of the ILECs.[5] Thus even when the only choice available under Section 252(i) was to adopt an entire agreement that had previously been approved by the state commission, some states imposed procedures which treated opt-ins in much the way original approvals were treated. Some state commissions

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2 *See e.g., MCIW Petition* at 4.

3 *MCIW Petition* at 5-10.

4 For example, Arkansas will not grant a local exchange certification until an interconnection agreement is approved by the commission.

5 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16141 ¶ 1321 (1996), *vacated in part*, 124 F.3d 934 (8th Circuit 1997), *aff'd in part and vacated in part sub nom*, AT&T v. Iowa Utilities Bd., 119 S. Ct. 721 (1999).

required the filing and approval of the "opt-in agreement" and provided that opt-ins did not become effective until the state approved it. As the *MCIW Petition* makes clear, such an approach unnecessarily imposes substantial burdens on CLECs.

II. <u>ILEC Practices Vitiate Section 252(i)'s Goal of Expedited Entry</u>

MCIW's petition adequately details the state imposed limitations on the opt-in approach; even more egregious, however, are the practices adopted by various ILECs. CLECs have experienced nearly every manner of delay the imagination can suggest. Once an opt-in letter is sent to an ILEC for the adoption of an existing agreement, that should begin and end the process. Not so. ILECs have adopted practices such as insisting on rewriting the agreement to replace the name of the CLEC, a process that is not only unnecessary but in the age of word processing is a matter that should be accomplished by a global search and replace process accomplished in minutes. Nonetheless, this process has in fact resulted in weeks of delay.

While such artificial delays may in fact simply be the result of inadequate resources being dedicated to the processing of interconnection agreements, the result is the same as the intentional creation of a barrier to entry. This is particularly the case when the ILEC refuses to take collocation or provisioning orders prior to the time the CLEC has received state approval of the opt-in agreement.

CLECs have also experienced obstacles to the use of the 252(i) option by ILECs asserting that a particular agreement is no longer available. This argument has been used with respect to agreements that have been available for some period of time self selected by the ILEC (6 months, one year, etc.). A variant to this approach is for the ILEC to take the position that the agreement is not available because it is going to expire in a relatively short time or that the initial term of the agreement has expired. What ILECs conveniently ignore is the fact that most agreements they entered into and that the state commissions approved, contain provisions that leave the agreement in effect until a new agreement is in place. That may not happen for a year or more. Nonetheless, the CLEC, even though prepared to take the agreement as it stands, including its month to month nature, is denied the option of utilizing that agreement. Since the term available to the CLEC is the term of the agreement it opts into, the risk of an early end to the agreement is on the CLEC and should not be used by the ILEC to delay CLEC entry. Rather than being able to commence operations immediately, the CLEC is delayed by the need to negotiate a new agreement.

While the Commission's rules provide minor exceptions to the opt-in abilities of a CLEC, the actual use of those rules has been limited to date.[6] Instead, CLECs face delays as a result of ILEC practices. As MCIW indicates in its petition, even when one of the FCC approved defenses to an opt-in is asserted, the procedures to decide the validity of the claim must be expedited and those portions of the agreement not subject to challenge should immediately be allowed to go into effect.[7]

Unfortunately, some of the circumstances faced by CLECs attempting to opt into agreements clearly are not as "innocent" as inadequate resources dedicated to the task of processing opt-in requests. When an opt-in agreement is returned for signature with language in the agreement changed, without notice to the CLEC, something more nefarious appears to be at

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6 47 C.F.R. § 51.809(b) (1999).

7 *MCIW Petition* at 19 and 23.

hand..[8] When an ILEC insists on the negotiation of opt-in terms that modify the underlying agreement, Section 252(i) is effectively undermined. While an ILEC may seek to reserve whatever legal rights it has to challenge the original terms of the interconnection agreement and seeks to explicitly do so in its opt-in agreement, it would appear to be doing nothing more than stating a right that already exists pursuant to the terms of the underlying agreement. To have this reservation of rights take weeks to process is wrong. To add to that reservation of rights unilateral provisions allegedly interpreting the underlying agreement and insisting that the CLEC concur in that interpretation violates Section 252(i). Yet CLECs have faced and are facing each of these practices by different ILECs at various times.

III. The FCC Should Act Promptly To Remove the Barriers to the Proper Use of Section 252(i)

In issuing the declaratory ruling MCIW has sought by its petition, the FCC should make it clear that not only must the states' procedures recognize the automatic nature of Section 252(i), but the FCC should specifically address delaying and/or strong arm tactics by the ILECs.

The importance of prompt action by the FCC is underscored by the fact that the number of companies seeking to enter the market continues to expand. Time is of the essence to these companies as well as for operating CLECs that seek to ensure stability and predictability for planning purposes and for purposes of obtaining the capital required by this capital intensive

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[8] In one ongoing episode, a CLEC opt-in request remains unfulfilled nearly 4 months after the request was made. During that period, the ILEC sought to negotiate a variety of conditions to the opt-in. After months of negotiations, the "signature ready" version arrived. Upon review, the agreement failed to reflect the agreement of the parties though there were no indications of further revisions on the "signature ready" copy.

business. Delays and uncertainties imposed by ILECs can have the indirect effect of increasing CLEC's cost of capital.

As noted for much of the period following the FCC's adoption of its "pick-and-choose" rules, when the initial round of interconnection agreements were negotiated, the FCC's rules were vacated by the Eighth Circuit's decision.[9] As CLECs seek to utilize the reinstated pick-and-choose provisions, rather than simply adopting an entire interconnection agreement previously approved by a state commission, the possibilities for unnecessary layers of review by the state commissions, and disputes and delays with ILECs is exacerbated. Prompt action by the FCC in addressing the MCIW petition hopefully will eliminate new variants of the difficulties faced by CLECs in utilizing Section 252(i) as the expedited approach to market entry envisioned by the Act. Simple, uniform and clear direction from the FCC to the state commissions and ILECs should accomplish this result. Accordingly, Joint Commenters urge the FCC to grant the relief sought by MCIW in its Revised Petition and take such other steps as it deems necessary.

Respectfully submitted,

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Dated: March 31, 2000

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[9] *See supra* note 5.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2000, copies of Joint Comments of Connect Communications Corporation, PacWest Telecomm, Inc., GlobalCom, Inc. and RCN Corporation were served by hand delivery upon the following:

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